92-110

In the

Supreme Court Of The United States

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No. _____

OCTOBER TERM, 1992

CHESTER GREEN
Petitioner

v.

STATE OF CONNECTICUT
Respondent

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE CONNECTICUT SUPREME COURT

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QUESTIONS PRESENTED

1. Was the petitioner denied due process of law at his state criminal law when in the course of its charge the trial court instructed the jury to choose between the comparative credibility of prosecution witnesses and defense witnesses?

2. Did the Connecticut Supreme Court err in upholding the validity of the petitioner's persistent felony offender conviction by finding that the underlying offense of aiding in the commission of an abortion did not involve a physician and thus that the offense was constitutional?

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RULE INVOLVED

Rule 17.1
Revised Rules of the Supreme Court
of the United States

Considerations Governing Review on Certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

STATEMENT OF THE CASE

As its statement of the case, the respondent adopts, with only the minor modification made at the end, the following excerpt from the opinion of the Connecticut Supreme Court (Petition at 5a-7a):

> In late December one Morris Ashcroft and two companions broke into a home in Westbrook and removed several antique guns from a chest in the basement. Through an intermediary, Ashcroft met the defendant at a gas station in Westbrook and sold him the guns for $300, informing him that they were stolen and narrating the circumstances of the burglary.
>
> Several days after Ashcroft re-entered the same house in Westbrook and took some more guns. He telephoned the defendant and arranged to meet him at a store in Westbrook, telling him he had stolen some other guns from the same place. When they met, the defendant purchased these guns for $500.
>
> A week or two later Ashcroft, this time with one companion, stole some rifles[2] as well as other items from the Westbrook residence. The defendant met Ashcroft at a restaurant in Meriden as a result of a telephone conversation and he bought the rifles for $800. At this meeting Ashcroft signed a receipt indicating a price of $2500 for the rifles. There was testimony that all of

[2] The guns previously stolen were presumably pistols.

> the stolen guns, which were admitted in evidence at the trial, had a value of $13,295.

On the basis of this evidence the jury found the petitioner guilty of one count of larceny in the second degree and one count of conspiracy to commit larceny in the second degree. The court then found the petitioner guilty of being a persistent felony offender. The defendant appealed to the Connecticut Supreme Court, which unanimously affirmed his conviction.

REASONS FOR THE DENIAL OF THE WRIT

I. THE DECISION OF THE CONNECTICUT SUPREME COURT REGARDING THE COMPARATIVE CREDIBILITY INSTRUCTION USED IN THIS CASE IS IN COMPLETE ACCORD WITH THE DECISIONS OF THE FEDERAL CIRCUIT COURTS AND OF THIS COURT.

The petitioner initially claims that he was denied due process of law when the trial court instructed the jury to choose between the comparative credibility of the prosecution and defense witnesses. Although the petitioner does not cite to any specific provision of the Considerations Governing Review on Certiorari, see Rule 17.1, Revised Rules of the Supreme Court of the United States, apparently the petitioner seeks a writ of certiorari on the theory that the Connecticut Supreme Court, in upholding the trial court's charge, has decided the comparative credibility question in a way in conflict with the decisions of several federal courts of appeal. See Rule 17.1(b).

In only one of the federal cases cited, United States v. Oquendo, 490 F.2d 161 (5th

Cir. 1974), did the circuit court reverse the defendant's conviction. There the district court had "repeatedly cast[] the jury's determination of whether to convict or acquit in terms of a mere credibility choice . . . ." Id. at 165. In the other cases the courts condemned the specific language under attack but after reviewing the entire charge found no reason to upset the conviction. Thus in United States v. Guest, 514 F.2d 777 (1st Cir. 1975), the court distinguished prior cases, including Oquendo, in which there had been "a more constant harping on the theme of comparative credibility . . . ." Id. at 779. In United States v. Brown, 582 F.2d 197, 201-02 (2d Cir.), cert. denied, 439 U.S. 915 (1978), the Second Circuit emphasized "the repeated references by the trial judge to the burden of proof resting on the prosecution." Id. at 201. Accord United States v. Pino, 609 F.2d 106, 108-09 (3d Cir. 1979).

Far from conflicting with the decisions of the federal courts, the holding of the Connecticut Supreme Court accords fully with them. Petition at 20a-23a. The instruction to compare the credibility of defense and prosecution witnesses occurred only once, Petition at 57e-58e, and occupies only four sentences in a charge that consumes some sixty-two pages of the Petitioner's Appendix. See United States v. Guest, supra; cf. United States v. Oquendo, supra. The trial court reminded the jury of the prosecution's burden of proof beyond a reasonable doubt on some nine occasions, Petition at 5e-10e, 23e, 40e, 43e (three times), 46e, 53e, 57e; see United States v. Brown, supra; United States v. Pine, supra, including once at length, Petition at 5e-10e, and once immediately prior to the language singled out by the petitioner. Petition at 57e. As for the petitioner's additional contention that the comparative credibility charge emphasized his

failure to testify in his own behalf, Petition at 9, it should suffice to say that the authority he cites is totally inapposite[1] and that, in any event, the trial court twice in explicit terms admonished the jury not to draw any adverse inference from the defendant's decision to remain silent. Petition at 17e, 46e.

A decision that in the context of the entire charge a comparative credibility instruction does not work fundamental injustice harmonizes not only with the rulings of the federal circuit courts, but also with the approach consistently taken by this Court. Just last term in United States v. Frady, 102 S. Ct. 1584 (1982), this Court reaffirmed that:

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[1] United States v. Alfonso-Perez, 535 F.2d 1362, 1366-67 (2d Cir. 1976), dealt with a claimed reference by a prosecutor in his summation to the defendant's failure to testify, and not with a comparative credibility instruction.

> "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." Cupp v. Naughten, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973)(citations omitted). Moreover, "a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction."

Id. at 1595. Because the challenged holding of the Connecticut Supreme Court conforms completely with these principles, it does not warrant further review by this Court.

II. THE QUESTION OF WHETHER THE PETITIONER'S PERSISTENT FELONY CONVICTION RESTED ON AN UNCONSTITUTIONAL PREDICATE FELONY IS INAPPROPRIATE FOR REVIEW AS IT TURNS SOLELY ON A FACTUAL ISSUE, THERE IS AN INSUFFICIENT RECORD, AND INDEPENDENT AND ADEQUATE STATE GROUNDS SUPPORT THE DECISION BELOW.

Petitioner also seeks review of the Connecticut Supreme Court's decision upholding the constitutionality of his prior conviction for aiding and abetting the commission of an

abortion, an offense which formed the basis for the trial court's finding that the petitioner was a persistent felony offender. The petitioner reasons that since Roe v. Wade, 410 U.S. 113 (1973), struck down a statute similar to the Connecticut abortion law, he was convicted of a charge which was either invalid on its face or unconstitutional in its application. Petition at 13.

The state fully acknowledges that a habitual offender conviction cannot rest on an unconstitutional predicate offense. Baldasar v. Illinois, 446 U.S. 222 (1980). Thus the only question in this case is whether that principle applies. In Connecticut v. Menillo, 423 U.S. 9 (1975), this Court declared that "Connecticut's statute remains fully effective against performance of abortions by

nonphysicians." Id. at 11.[2] Given this holding, it is apparent that the constitutionality of the defendant's persistent felony offender conviction turns solely on whether the person who actually performed the abortion in question was a physician.

The obvious reason why this Court should not address this question is that it is wholly

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[2] Such a holding, of course, merely exemplifies the general rule that a statute may operate in a manner consistent with constitutional requirements in one set of circumstances although as to another it may produce an unconstitutional result. Boddie v. Connecticut, 401 U.S. 371, 379 (1979). In light of these principles, there is no merit to the defendant's contention that the abortion statute was unconstitutional on its face.

factual in nature.[3] This Court has stated that "matters which are usually termed issues of fact are for conclusive determination by the State courts and are not open for reconsideration [here]." Wolfe v. North Carolina, 364 U.S. 177, 196 (1960). The resolution, moreover, of a purely factual issue such as whether a particular abortion

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[3] Only cursorily does the petitioner raise the legal question of whether the Connecticut Supreme Court employed permissible methods in declining to find that the abortionist was physician. Without citing to any authority, the petitioner, in his concluding two sentences, challenges the "presumption" allegedly used by the Connecticut Supreme Court in deciding "that the facially invalid statute was applied in a lawful manner." Petition at 14. Whether the court utilized such a presumption is not altogether clear. To a large extent, the court based its decision on the fact that in the trial court the petitioner failed to attack the constitutionality of his prior conviction. Petition at 26a-27a. There is, in any event, authority to the effect that, except when a claimed denial of the right to counsel is raised, the silence of a trial court record with respect to the regularity of its procedure gives rise to the presumption that the court complied with all jurisdictional and procedural requirements for the entry of a valid judgment. Crawford v. Coiner, 152 W. Va. 411, 163 S.E.2d 793, 797-98 (1968).

was performed by a licensed physician could have absolutely no precedential value for the legal system as a whole.

Even if this Court were otherwise inclined to address the factual issue here, there is no record to facilitate such review. The petitioner admits that in the Connecticut Supreme Court opinion upholding his original aiding and abetting conviction "there is no indication one way or the other respecting the physician status of the individual Orsini had assisted although there are some indications that the individual was considered to be a physician." Petition at 13. An examination of the record and briefs of that appeal is similiarly unilluminating. While the actual resolution of the factual question under consideration may well lurk invisibly behind the record, it is self-evident that this Court, as a Court of last resort, cannot conduct the evidentiary hearing necessary to resolve the dispute.

Related to and no doubt responsible for the lack of a complete factual record for evaluating this claim is the fact that the defendant never raised the claim in the trial court. See Webb v. Webb, 101 S. Ct. 1889, 1893 (1981)(requirement that federal issue be presented first in state court affords parties opportunity to develop record necessary for adjudicating the issue); Petition at 23a. It is familiar rule that the failure to present a federal question in conformance with state procedures constitutes an independent and adequate ground of decision barring review in this Court so long as the state has a legitimate interest in enforcing those procedures. Michigan v. Tyler, 436 U.S. 499, 512 n.7 (1978). Connecticut has such

contemporaneous objection rules[4] and unquestionably legitimate purposes have been advanced in their support.[5]

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[4] "Only in most exceptional circumstances can and will this court consider a claim, constitutional or otherwise, that has not been raised and decided in the trial court." State v. Evans, 165 Conn. 61, 69, 327 A.2d 576 (1973).

[5] In the words of the Connecticut Supreme Court, the consideration of alleged errors raised for the first time on appeal would mean that:

> (1) claims of error would be predicated on matters never called to the attention of the trial court and upon which it necessarily could have made no ruling in the true sense of the word; and (2) the appellee, [in a criminal case] the state, would be lured into a course of conduct at the trial which it might have altered if it had any inkling that the accused would, in the event of a conviction, claim that such a course of conduct involved rulings which were erroneous and prejudicial to him.

State v. Kurvin, 186 Conn. 555, 564, 442 A.2d 1327 (1982).

It might be said that in this case the Connecticut Supreme Court chose not to exercise its own contemporaneous objection rules, Petition at 23a, and that therefore plenary review in this Court is not precluded. While such an argument has some force in the abstract, see Payton v. New York, 100 S. Ct. 1371, 1378 n.9 (1980), it would not be wholly appropriate here. In accordance with its own case law regarding unseasonably raised yet arguably fundamental claims of error, State v. Evans, 165 Conn. 61, 70, 327 A.2d 576 (1973), the Connecticut Supreme Court expressly limited its review to a determination of whether "the record clearly demonstrates a deprivation of a fundamental constitutional right." Petition at 27a. Logically, if this Court will honor state contemporaneous objection rules when the state courts enforce them, Michigan v. Tyler, supra, but not when there is no such enforcement, Payton v. New York, supra, then when a state court, pursuant to such rules, affords but a limited review,

this Court's review, if any, must be similarly limited. Thus this Court can at most look to see "whether the record clearly demonstrates a deprivation of a fundamental constitutional right."

As indicated, the dispositive issue here is whether the person who performed the abortion in question was a physician. Certainly the record does not "clearly demonstrate[]" that he was. Indeed, one could say that the record supports precisely the opposite finding.[6] There is, therefore, no necessity for further review.

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[6] The corrected opinion of the Connecticut Supreme Court reads that "[t]he abortion was performed by a person who used the name of 'Dr. Walker' as an alias in a motel room with an implement described as a 'shoehorn device' while the defendant fed the woman some pills." Petition at 1d. These facts indicate that the person performing the abortion used something less than medically-approved methods.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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I hereby certify that three copies of this brief have been mailed by August 16, 1982 to John R. Williams, Esquire, Williams & Wise, 265 Church Street, New Haven, Connecticut 06510.

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